84-198

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOUIS E. OLIVERO, Appellant

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE
ILLINOIS SUPREME COURT

JURISDICTIONAL STATEMENT

LOUIS E. OLIVERO
Pro Se
1615 Fourth Street
P. O. Box 526
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JURISDICTIONAL STATEMENT

Pursuant to Rules 10 and 15 of the Rules of the Supreme Court of the United States, appellant, Louis E. Olivero, files this statement of the basis upon which it is contended that the Supreme

Court of the United States has jurisdiction to review the judgment entered by the Illinois Supreme Court in this case and should exercise such jurisdiction herein.

QUESTIONS PRESENTED

1. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO CONSIDER THE ISSUE OF THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF ILLINOIS SUPREME COURT RULE 413.

2. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO RULE CONCERNING THE STATE'S ATTORNEY'S ALLEGED ABUSES OF THE GRAND JURY PROCEDURE AND WHETHER THESE ALLEGED ABUSES ARE REPUGNANT TO THE UNITED STATES CONSTITUTION.

3. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO CONSIDER THE QUESTION OF VIOLATION OF APPELLANT'S RIGHTS GUARANTEED HIM BY THE FIRST

AMENDMENT TO THE UNITED STATES CONSTITUTION.

4. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO CONSIDER THE QUESTION OF DENIAL TO APPELLANT OF HIS RIGHT TO TRIAL BY JURY GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

LIST OF ALL PARTIES IN ILLINOIS SUPREME COURT

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TABLE OF AUTHORITIES

Cases:

United States v. Mandujano, 425 U.S. 564, 595, 96 S.Ct. 1768, 48 L.Ed.2d 212, Justices Brennan and Marshall, concurring opinion, citing Lawn v. United States, 355 U.S. 339, 2 L.Ed.2d 321, 78 S.Ct. 311 and United States v. Calandra,

414 U.S. 345, 346, 38 L.Ed.2d 561, 94 S.Ct. 613.

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82.

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446.

Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522.

New York Times Co. v. Jascalevich, 439 U.S. 1317, 99 S.Ct. 6, 58 L.Ed.2d 25.

Hamilton v. Regents of the University of California, 293 U.S. 245, 257, 55 S.Ct. 197, 79 L.Ed. 343.

Chicago & E.I.R. Co. v. Industrial Commission, 284 U.S. 296, 52 S.Ct. 151, 76 L.Ed. 304.

People v. Hummel, 38 Ill.App.3d 233, 347 N.E.2d 305.

County of McLean v. Kickapoo Creek, Inc., 51 Ill.2d 353, 282 N.E.2d 720.

People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, 57 Ill.Dec. 589.

Constitution:

First Amendment

Fourth Amendment

Fifth Amendment

Sixth Amendment

Fourteenth Amendment, Section 1

Statutes:

28 U.S.C. Sec. 1257 (2, 3)

28 U.S.C. Sec. 2103

Illinois Revised Statutes, Chapter 110A, Section 315(a).

Illinois Revised Statutes, Chapter 110A, Section 413(d)

Illinois Revised Statutes, Chapter 110A, Sections 414(a) and (b)

Miscellaneous:

Total Pre-Trial Disclosure to the State: A Requiem to the Accusatorial System, 60 Illinois Bar Journal 534.

OPINIONS BELOW

The order of the Illinois Supreme Court has yet to be published and is included herein as Appendix A.

The opinion of the Third District Appellate Court of Illinois is published at _____ Ill.App. _____, 461 N.E.2d 549, 77 Ill.Dec. 926, and appears herein as

Appendix B.

The order of the Circuit Court of Bureau County is unpublished and appears herein as Appendix C.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from the Illinois Supreme Court's denial of leave to appeal the Third District Appellate Court of Illinois' affirmance in part and modification in part of an order of the Circuit Court of Bureau County, Illinois, finding Louis E. Olivero in contempt of court for refusing to proceed with a trial.

Clearly, the judgment sought to be reviewed is a "final" one for purposes of invoking this Court's jurisdiction under 28 U.S.C. Sec. 1257(2) to review judgment rendered by the highest court of the State of Illinois within which

review might be had. New York Times Co. v. Jascalevich, 439 U.S. 1317, 99 S.Ct. 6, 58 L.Ed.2d 25, holds that a judgment of civil or criminal contempt entered against a non-party witness is sufficient to satisfy the finality requirement. 439 U.S. 1317, 1319. There can be no serious question that the judgment of contempt sought to be reviewed herein is a final one for purposes of appeal to the United States Supreme Court.

The judgment sought to be appealed is inextricably intertwined with the interpretation of Illinois Supreme Court Rule 413. That rule fits well within the definition of a "statute" of a state as the term is understood in cases interpreting 28 U.S.C. Sec. 1257(2). See, e.g., Hamilton v. Regents of the University of California, 293 U.S. 245, 257, 55 S.Ct. 197, 79 L.Ed. 343, where

"statute of any state" is defined as not limited to the act of a state legislature, but encompasses "every act legislative in character to which the state gives sanction, no distinction being made between acts of the state Legislature and other exertions of the state lawmaking power". [Citations omitted.]

The Illinois Supreme Court in People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, 57 Ill.Dec. 589, stated as follows:

> "A rule adopted by this court is an expression of its inherent or constitutional power which, upon its effective date, becomes law the same as a statute or the law in a given case."

Thus, by the Illinois Supreme Court's own interpretation, its rule making is an exercise of the state's lawmaking power.

Furthermore, the United States

Supreme Court's jurisdiction attaches to the instant appeal despite the fact that the Illinois Supreme Court, in the exercise of its discretion, declined to reach the merits of the dispute, but rather denied the petition for leave to appeal under Illinois Supreme Court Rule 315(a), made applicable to criminal appeals by Illinois Supreme Court Rule 612(b). Whether or not the Illinois Supreme Court reached the merits of the controversy, appellant has exhausted his state remedies. Compare Chicago & E.I. R. Co. v. Industrial Commission, 284 U.S. 296, 52 S.Ct. 151, 76 L.Ed. 304, where this Court held that certiorari to the circuit court was proper after the Illinois Supreme Court had declined to review an Industrial Commission award. Nevertheless, should this Court decide that it lacks jurisdiction under 28

U.S.C. Sec. 1257(2) to consider this appeal, then appellant submits that the questions raised by the instant controversy present an appropriate occasion for treatment, under 28 U.S.C. 2103, of this jurisdictional statement as a petition for writ of certiorari under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment of the United States

Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Sec. 1257 provides in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 U.S.C. Sec. 2103 provides as follows:

> "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

Section 315(a) of Chapter 110A of Illinois Revised Statutes provides:

> "A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following,

> while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed."

Section 413(d) of Chapter 110A of Illinois Revised Statutes provides:

> "Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded

> statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and
>
> (ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;
>
> (iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense."

Sections 414(a) and (b) of Chapter 110A of Illinois Revised Statutes provide:

> "(a) If it appears to the court in which a criminal charge is pending that the deposition of any person other than the defendant is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial, the court may, upon motion and notice to both parties and their counsel, order the taking of such person's deposition under oral examination or written questions for use

as evidence at a hearing or trial."

"(b) The taking of depositions shall be in accordance with rules providing for the taking of depositions in civil cases, and the order for the taking of a deposition may provide that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place."

STATEMENT OF THE CASE

On November 9, 1982, Paul Powers, hereinafter defendant, was indicted for the crime of arson by the grand jury of Bureau County, Illinois. Shortly thereafter defendant retained appellant, who duly entered his appearance in the Circuit Court of Bureau County as attorney for defendant and entered a plea of not guilty.

In statements given on November 7, 1982, the state's witnesses against de-

fendant had alleged that defendant had admitted burning a structure housing a tavern business which competed with an adjoining tavern owned by defendant's brother-in-law, Ted Errio. These witness statements further alleged Mr. Errio's involvement as a co-conspirator with defendant. Ted Errio was at the time married to Nina Powers Errio, who assisted in operation of his business.

On August 5, 1983, as is required by Illinois Supreme Court Rule 413 (d) (i), appellant disclosed to the State's Attorney of Bureau County that he intended to call Nina Powers and Ted Errio as witnesses for defendant at trial.

On August 8, 1983, three days after being informed by the defense that Ted Errio and Nina Powers would be defense witnesses, and many months after defendant had been indicted, and after the

witness Nina Powers had been contacted by the State's Attorney of Bureau County, the State's Attorney of Bureau County subpoenaed Errio and Ms. Powers to testify before the Bureau County Grand Jury.

On August 10, 1983, Nina Powers testified before the Grand Jury. The State's Attorney began the questioning with the following remarks:

> "All right. What I am concerned about is hearing what you'll say about the case which we've charged your brother with."

The Bureau County State's Attorney thereupon conducted a wide-ranging examination of Nina Powers concerning virtually every aspect of her knowledge of the pending charges against defendant.

On August 22, 1983, appellant filed a motion for injunctive relief to prevent transcription or use of Nina

Powers' grand jury testimony by the State's Attorney. The motion was denied by the trial court.

On August 26, 1983, appellant received a transcript of Nina Powers' grand jury testimony taken on August 10, 1983, immediately filed an application to say proceedings as well as a notice of appeal of the denial of appellant's motion for injunctive relief and so informed the trial court. Defendant's trial had been scheduled to commence on August 29, 1983 at 10:00 A.M.

On August 29, 1983, appellant argued to the trial court among other matters that the Illinois Supreme Court Rules relating to criminal discovery are unconstitutional insofar as they require pre-trial disclosure by defendants. Appellant argued further that the State's Attorney had abused the grand jury pro-

cess for purposes of taking a pre-trial discovery deposition of a defense witness, a procedure not permitted under Illinois law except for the purpose of perpetuating testimony. See Illinois Supreme Court Rule 414. The trial court nevertheless struck defendant's notice of appeal, and ordered appellant to begin trial as previously scheduled.

At 1:00 P.M. on August 29, 1983, appellant filed an application to stay the criminal trial of People v. Powers and before 1:30 P.M. informed the trial court of the filing. Although appellant renewed all of his arguments raised in the earlier motion hearing, the trial judge rejected all of appellant's arguments and found him in direct criminal contempt of court, sentencing him to pay a fine of $1,009.00.

On March 9, 1984, the Third Dis-

trict Appellate Court of Illinois affirmed the lower court's finding of contempt but reduced the fine to $500.00 since appellant was not afforded a jury trial and did not waive that right. People v. Powers, _____ Ill.App. _____, 461 N.E.2d 549, 77 Ill.Dec. 926. Appellant filed a timely petition for appeal as a matter of right in the Illinois Supreme Court, praying in the alternative for leave to appeal. On July 6, 1984, the Illinois Supreme Court denied leave to appeal. This appeal followed.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that:

1. Illinois Supreme Court Rule 413 is repugnant to the Fifth, Sixth and Fourteenth Amendments to the United

States Constitution.

2. The State's Attorney's abuses of the grand jury procedure, for his opposition to which appellant was found in contempt, are repugnant to the Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

3. Appellant's right to freedom of speech guaranteed to him by the First Amendment to the United States Constitution was violated by the order of contempt found against him.

4. Appellant's right to trial by jury guaranteed to him by the Sixth and Fourteenth Amendments of the United States Constitution was violated.

A time-honored means which has been recognized by Illinois courts for challenging the validity of a trial court's discovery order in a criminal case has been for counsel to oppose the trial

court's order of production, allow himself to be found in contempt and a nominal fine imposed against him. (See, e.g., People v. Hummel, 38 Ill.App.3d 233, 347 N.E.2d 305, where an assistant State's Attorney was held in contempt and fined 10¢ for an alleged refusal to comply with a pre-trial discovery order in a felony case.) All issues bearing on the propriety of the discovery order are then called into question.

In the case at bar, appellant vigorously argued the unconstitutionality of Illinois pre-trial discovery rules calling for disclosure by criminal defendants. He additionally argued that the State's Attorney had compounded the prejudice to defendant which is inherent in Rule 413 by taking advantage of defendant's Rule 413 disclosure of witnesses and deposing one of those

witnesses before the grand jury on the eve of trial solely for purposes of discovery. The State's Attorney admitted at the outset of his grand jury interrogation of Nina Powers that he sought her testimony solely for discovery purposes relating to the impending trial of defendant. See Facts of the Case, page 20.

If, as this Court's opinions have held, (United States v. Mandujano, 425 U.S. 564, 595, 96 S.Ct. 1768, 48 L.Ed.2d 212, Justices Brennan and Marshall, concurring opinion, citing Lawn v. United States, 355 U.S. 339, 2 L.Ed.2d 321, 78 S.Ct. 311 and United States v. Calandra, 414 U.S. 345, 346, 38 L.Ed.2d 561, 94 S.Ct. 613), compelling an accused to be a witness against himself by calling him to testify after his indictment is repugnant to the constitution, how may

it be said that a practice of summoning witnesses against the accused to testify before a grand jury after indictment of the accused furthers any proper purpose? Once an indictment has been returned against the accused, the grand jury's legitimate concern with that accused is essentially at an end unless additional indictments are sought against him, which was not the case here.

The report of proceedings before the Bureau County grand jury will show, and the State's Attorney has admitted in arguments to the trial court in chambers, that no indictment was sought against Nina Powers. The conclusion is inescapable that the Bureau County State's Attorney subpoenaed Nina Powers before the grand jury for the sole purpose of obtaining pre-trial discovery for use against the defendant under the

guise of a grand jury investigation.

Appellant foresaw the thorny problems of denial to his client, Paul Powers, of effective right to confront and cross-examine witnesses guaranteed him under the Fifth Amendment to the United States Constitution, as a result of the State's Attorney's abuse of the grand jury process. That is, while the State's Attorney arrogated the power to himself to depose Nina Powers, defendant had no corresponding right to confront and cross-examine the witness under oath before the grand jury.

Permitting the prosecution to abuse compulsory process so as to extract pre-trial testimony from defense witnesses, in a setting uniquely insulated from any defense opportunity to object, cross-examine or clarify, violates defendant's Fourth, Sixth and Fourteenth

Amendment rights. Appellant took it upon himself to challenge the violation of those rights and because of that challenge he was found in contempt.

It cannot be emphasized too strongly that the very reciprocity that this Court identified as the sine qua non of constitutional validity of pre-trial criminal discovery, is completely absent here. That is, although the State's Attorney by his abuse of the grand jury process assumed the power to order and take a discovery deposition of a defense witness, the defense under Illinois procedure was totally denied the corresponding power to depose the prosecution's witnesses.

Such asymmetry flies in the face of Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82. It must be remembered that Illinois Supreme Court

Rules provide evidence depositions only to preserve testimony because of substantial possibility the witness will be unavailable at hearing or trial (Illinois Supreme Court Rule 414(a)) and also no provision is made for discovery depositions in any criminal case. The prosecution witnesses are, of course, under absolutely no obligation to grant an interview with defense counsel, and ordinarily do not.

This Court has never passed upon the constitutionality of Illinois Supreme Court Rule 413 and specifically Supreme Court Rule 413(d)(1) which requires the defense to disclose the names and last known addresses of persons he intends to call as witnesses. Appellant submits that a list of names and addresses of witnesses the defense intends to call at trial is testimonial

and communicative in nature since the primary source for identity of witnesses will ordinarily be the defendant himself.

Williams v.Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446, did not go so far as to countenance the broad and sweeping scope of disclosure by the accused which is mandated under Illinois Supreme Court Rule 413. Williams v. Florida concerned itself with the alibi defense, which is in the nature of an affirmative defense and uniquely likely to take the prosecution by surprise. In the William v. Florida situation, reciprocal disclosure of alibi witnesses by defense and prosecution may not offend the constitution. It is a totally separate and distinct inquiry whether reciprocity of disclosure by the state is sufficient to cure the constitutional

defects of Illinois Supreme Court Rule 413.

In addition to Fifth Amendment objections as to the compelled self-incrimination which Rule 413 requires, equally troublesome questions of denial of effective assistance of counsel arise, since counsel is in effect compelled by force of the rule to violate his obligations of zealous advocacy and preservation of the confidences and secrets of the client.

Commentators have noted that Rule 413 in effect transforms defense counsel into a conduit channeling information he has obtained from the defendant to the prosecution. See, e.g., Total Pre-Trial Disclosure to the State: A Requiem to the Accusatorial System, James J. Doherty, 60 Illinois Bar Journal 534, wherein Mr. Doherty makes the point that

the pessimistic predictions of Mr. Justice Black in his Williams v. Florida dissent, 399 U.S. 78, 114, 115, have come to pass in Illinois.

Appellant's freedom of speech was violated by the judgment of contempt against him. An attorney like any other individual is guaranteed freedom of speech by the First Amendment to the United States Constitution and an attorney perhaps more than any other individual must rely on that freedom in practicing and advancing his profession. Appellant's closely-related right to petition the government for redress of grievances was similarly violated by the contempt order. One hallmark of the right of freedom of speech, espcially as it involves attorneys, is the calm and orderly discourse it engenders.

During the trial court proceedings

appellant argued firmly held convictions, supported by legal analysis, in the trial judge's chambers. When the trial judge disagreed with the position expressed by appellant, appellant offered in accordance with generally accepted Illinois practice to submit himself to the contempt power of the court in order to test his good faith belief in the correctness of his position. Because appellant's purpose was to test the trial court's rulings on discovery, it offends the principles of freedom of speech to impose more than a nominal fine upon appellant's good faith approach. Specifically, the fine of $1,009.00 was so excessive as to violate sound constitutional principles and constituted a penalty imposed against defendant for good faith expression of his freedom of speech and his right to

petition the government.

Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522, holds there is a right to jury trial in cases involving serious contempts. The magnitude of the fine imposed herein leaves no doubt that the trial judge regarded appellant's alleged contempt as a serious one. That being the case, the summary imposition of a heavy fine deprived appellant of his fundamental right to trial by jury. The violations of appellant's Sixth and Fourteenth Amendment rights in this regard were not cured by the Third District Appellate Court of Illinois' sua sponte reduction of the fine to $500.00. The violation of appellant's right to trial by jury vitiates the entire order of contempt, not merely that portion of the fine exceeding $500.00. Infringement of

appellant's basic constitutional rights cannot be so easily cured.

The Third District Appellate Court's opinion below cites only one case, County of McLean v. Kickapoo Creek, Inc., 51 Ill.2d 353, 282 N.E.2d 720, as authority in support of its reduction of the fine from $1,009.00 to $500.00, and does not directly address Bloom v. Illinois. However, the Illinois Supreme Court in County of McLean v. Kickapoo Creek, Inc. did cite Bloom v. Illinois and rather than summarily reducing the fine to the $500.00 maximum allowed where defendant is not granted a jury trial, reversed and remanded the case for a new trial. The Illinois Supreme Court stated at page 722 of the Northeastern Reporter Second Series as follows:

> "Where no maximum penalty is authorized, the seriousness of the charge is to be determined

> by the severity of the actual sentence (Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162; Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522; Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629)."

Because the seriousness of the offense is defined by the severity of the actual sentence imposed, it is thoroughly arbitrary and unprincipled and fails to cure constitutional defects for a court of review to simply reduce the fine imposed and thereby evade the issues of appellant's right to jury trial.

The cause should have been reversed and remanded for a full hearing before a jury, and the Illinois Supreme Court's failure to so order is violative of appellant's constitutional rights.

Respectfully submitted,

LOUIS E. OLIVERO

APPENDIX

A.

Order entered by the Illinois Supreme Court on June 5, 1984 in words and figures as follows:

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause. Ryan C. J., took no part.

The mandate of this Court will issue to the Appellate Court on June 27, 1984.

B.

Opinion of the Third District Appellate Court filed March 9, 1984 in words and figures as follows:

Mr. JUSTICE HEIPLE delivered the Opinion of the Court:

Louis Olivero appeals from an order of the Circuit Court of Bureau County

finding Olivero in contempt of court for refusing to proceed with a trial.

Olivero, a lawyer, was representing his client, Powers, in an arson case. Olivero filed a motion for a temporary restraining order (TRO) with the trial court in order to prevent the State from transcribing and using certain testimony obtained in a grand jury proceeding. Olivero felt the testimony was improperly obtained and would be used by the State in preparing its case against Powers. The trial court refused to grant the TRO and set Powers' trial for August 29, 1983. Powers, through Olivero, filed an interlocutory appeal to this court.

On August 29, 1983, just prior to trial, Olivero argued to the trial court that Powers' appeal relieved the lower court of jurisdiction. The State moved

to quash the appeal because Powers had no right to an interlocutory appeal in his criminal case. The trial judge observed that a trial court only loses jurisdiction when a proper appeal is filed. Since Powers' interlocutory appeal was not authorized by any law or rule, his appeal was not proper; consequently, the trial court did not lose jurisdiction. The trial judge granted the motion to quash the appeal. Yet, Olivero continued to argue the lower court had no jurisdiction over the case.

Despite the trial judge's repeated attempts to convince Olivero that his position was untenable, Olivero indicated that neither he, nor his client, would participate in the trial. The trial judge then warned Olivero that if Olivero did not start the trial, he would be held in contempt and fined

$1,009 ($806 for jury fees, $153 for mileage and $50 for two bailiffs). Olivero refused to comply with the judge's request and the judge proved true to his word. This appeal followed.

Before examining the contempt issue, we would like to note that a review of the record of the Powers case, and the briefs of the parties, reveals no grounds to support the granting of a TRO. Moreover, we know of no authority which will allow an interlocutory appeal by Powers of the denial of the TRO in his criminal case. In order to restrict the use of the grand jury testimony, Olivero should have submitted a motion in limine or a motion to suppress. However, such evidentiary issues cannot be appealed by a defendant until a final disposition of his case.

In short, we find a glaring lack of

authority in support of the theories which Olivero apparently believed justified his refusal to participate in Powers' trial. Nevertheless, even if the law did support Olivero's arguments, we could not and will not countenance his conduct before Judge Wampler. A lawyer's good faith belief in the accuracy of his argument, or his ignorance of the law, or the absence of contemptuous intent, is no justification for his acts of contempt. (See People v. Hass (1981), 100 Ill. App. 3d 1143.) A lawyer's actions before the court speak louder than his words.

This is not a case of indirect criminal contempt where the attorney missed an appearance date and the trial court was unaware of the reason for the absence. (See People v. McNeil (1976), 42 Ill. App. 3d 1036). Here, we have a

case of direct criminal contempt. The lawyer and judge were face to face shortly before trial. Judge Wampler explicitly instructed Olivero that if he did not participate in the trial, he would be held in contempt. Olivero deliberately chose not to respect the wishes of the court and prevented the court from holding the trial. Such an act by a lawyer can be characterized as nothing other than conduct calculated to hinder or obstruct a court in its administration of justice, or to derogate from its authority or dignity (People v. Hass.) Thus, it was criminally contemptuous. We affirm the lower court's finding of contempt.

However, we must reduce the fine imposed by the trial judge. Our Supreme Court, in County of McLean v. Kickapoo Creek, Inc. (1972), 51 Ill. 2d 353, held

that, where the record reveals that the defendant was not afforded a jury trial, or did not waive his right to a jury, the contempt fine cannot exceed $500. The record reveals neither a jury trial nor a waiver. Consequently, we order that the fine be reduced to $500.

AFFIRMED IN PART; MODIFIED IN PART.

SCOTT and STOUDER, JJ., concur.

C.

Order entered by the Circuit Court of Bureau County on September 2, 1983 in words and figures as follows:

This cause coming on for jury trial on the 29th of August, 1983, and the People of the State of Illinois being present by the Bureau County State's Attorney, James R. May, and the defendant not being present in court but represented and present by Louis E.

Olivero, his attorney, the Court finds as follows:

1. That this cause was set for trial on the merits on August 29, 1983, by order of this court on May 27, 1983.

2. That this court entered its order denying defendant's emergency motion for temporary restraining order on August 22, 1983.

3. That the court denied the defendant's application to stay the proceedings to perfect an appeal of the denial of the emergency motion for temporary restraining order on August 26, 1983.

4. That the court denied the defendant's motion for a continuance on August 26, 1983, and again ordered trial to proceed on August 29, 1983, as originally ordered on May 27, 1983.

5. That on the date for trial,

to-wit, August 29, 1983, attorney Louis E. Olivero, attorney for the defendant, appeared before this court and informed the court he had instructed the defendant not to be present in court for trial.

6. That again on August 29, 1983, this court, shortly before twelve o'clock noon, ordered attorney Louis E. Olivero to have his client present at 1:30 P.M. to begin trial.

7. That again on August 29, 1983, at approximately 1:30 P.M. attorney Louis E. Olivero appeared before this court and again informed the court that his client was not present for trial, even though he stated his client was available for trial in the City of Spring Valley.

8. That on August 29, 1983, at approximately 1:30 P.M. the court in-

formed attorney Olivero that the trial would proceed without the defendant being present and further ordered attorney Louis E. Olivero to proceed to the court room [sic] for the purpose of selecting a jury.

9. That at or about the same time and date, attorney Louis E. Olivero informed the court he was not going to proceed with the trial in this case, nor was he going to enter the court room [sic] for the purpose of selecting a jury in this case.

10. That on the same date and hour the court advised Mr. Olivero if he did not proceed to trial he would be found in direct criminal contempt of court and would be fined the sum of $1,009.00.

11. That at the same time and place and hour, after instructions and orders of the court on the same date and re-

ferred to above, the court found attorney Louis E. Olivero in direct criminal contempt of this court.

12. That the cost of having the jury present on August 29, 1983, was in the approximate total amount of $1,009.00, which included 52 jurors at $15.50 per day per juror, mileage for said jurors in the total amount of $153.00 and bailiffs [sic] salaries of $50.00.

IT IS THEREFORE ORDERED BY THE COURT AS FOLLOWS:

A. That attorney Louis E. Olivero is hereby found and declared to be in direct criminal contempt of this court.

B. That attorney Louis E. Olivero be and is hereby fined the amount of $1,009.00 for his direct criminal contempt.

C. That said fine is to be paid

within 30 days of the entry of this order. Said fine to be made payable to the Bureau County Circuit Clerk.

DATED: September 2, 1983.

Office-Supreme Court, U.S.
FILED
OCT 17 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUIS E. OLIVERO,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois, Third Judicial District

MOTION TO DISMISS AND TO DENY ALTERNATIVE RELIEF

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Printed by Authority of the State of Illinois (P.O. 32601—50—10-17-84)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUIS E. OLIVERO,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois, Third Judicial District

MOTION TO DISMISS AND TO DENY ALTERNATIVE RELIEF

Appellee, by his attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, moves this Court to dismiss the appeal filed herein and to deny the alternative relief requested by appellant pursuant to 28 U.S.C. §2103 inasmuch as the constitutional validity of a state court statute is not drawn into question by this case and no substantial federal question has been presented by appellant's Jurisdictional Statement.

I.

THE PROCEEDINGS BELOW

On November 9, 1982, appellant's client, Paul Powers, was indicted for the arson of Shirley's Tavern. (C. 3) The People filed their answer to the defendant's request for discovery pursuant to Supreme Court Rule 412 and listed the names and addresses of persons whom they intended to call as witnesses at trial, including Ted and Nina Errio. (C. 9-11) On May 27, 1983, the trial court ordered that trial commence on August 29, and on August 5, the defendant answered the People's demand for discovery pursuant to Supreme Court Rule 413. In his answer, the defendant also listed as potential witnesses Ted and Nina Errio. (C. 26, 36-37)

On August 10, 1983, the grand jury reconvened in a continuing investigation of the arson of the tavern. (C. 63) Nina Powers testified that she was now divorced from Ted Errio and answered questions concerning the arson and whether Ted Errio might have been involved. She further responded that she understood the State's Attorney was not really concerned about her possible participation in the offense. (C. 64-85) Ted Errio also appeared before the grand jury, but after answering a few preliminary questions, he refused to answer any others. (C. 85-89) An attorney for both Nina Powers Errio and Ted Errio was present during the grand jury proceedings. (C. 64, 86)

On August 22, 1983, the defendant filed an Emergency Motion for a Temporary Restraining Order seeking to prevent transcription of the August 10 grand jury proceedings or alternatively to prevent the State's Attorney from

reviewing the transcript if it had already been typed. (C. 38-45) The basis for the defendant's motion was his contention that the State's Attorney had improperly used the grand jury procedure to obtain an evidence deposition from Nina Powers Errio and Ted Errio after the defendant had listed those persons as potential witnesses in his criminal defense. At a hearing on the motion held that day, the State's Attorney explained the State's theory of the case against defendant to be that two witnesses would testify that the defendant was hired by Ted Errio and Nina Powers Errio to commit the arson. Ted Errio was the target of the August 10, 1983, grand jury and the State's Attorney had offered Nina Powers Errio immunity for her testimony. (R. 4, 20-21) They had not previously been called before the grand jury because it had only been days since the State's Attorney learned that the defendant had rejected his long-standing offer of leniency in exchange for defendant's testimony against Ted Errio. (R. 5-10, 37-41) The trial court denied the defendant's motion, finding that the State's Attorney's action in subpoenaing the Errios before the grand jury in a continuing investigation was not improper. (C. 26, 44)

On August 26, appellant received by mail a transcript of the August 10 grand jury proceedings and filed on behalf of his client a notice of appeal from the August 22 order denying his motion for a temporary restraining order. (C. 53-55) He also filed an Application to Stay Proceedings in an effort to stay the commencement of the jury trial scheduled to begin Monday August 29, 1983, and a motion for a continuance of the criminal trial on the ground that he was appealing the denial of the request for a temporary restraining order. (C. 56-92) These motions were denied. (C. 91)

On August 29, appellant informed the judge that he had filed a notice of appeal from the denial of his motion to stay and that the trial court was thereby deprived of jurisdiction to proceed. (R. 24, 25) The court, finding that the defendant was not entitled to an interlocutory appeal under Illinois law, granted the People's motion to strike the Notice of Appeal. (R. 28-31, 41, 42) That day, appellant further informed the court that he had advised the defendant not to appear at that time because the appellant had filed a notice of appeal. (R. 52) The trial judge then responded that he had advised appellant on Friday that the trial would commence on Monday. (R. 52-53)

Apparently after a recess, the court reconvened at 1:59 p.m. with only the trial judge, appellant, the State's Attorney, and the clerk present. The trial judge stated for the record that, at appellant's direction, the defendant was not present and that appellant refused to begin the trial. (R. 53-54) The trial judge also stated that he had told appellant repeatedly that if he did not commence the trial he would be held in contempt of court and fined $1,009.00. (R. 54) After appellant again informed the court that he would not proceed to trial, he was found in contempt and fined $1,009.00. (R. 54-56; C. 105-07)

On appeal to the Appellate Court of Illinois, Third Judicial District, the appellate court held that no grounds existed to support the grant of a temporary restraining order and that in any event defendant's attempt to press an interlocutory appeal was unauthorized. The court further noted that even if appellant's legal theories were sound, the fact would not justify his refusal to proceed to trial. While the finding of contempt was affirmed, the court reduced the fine imposed to $500.00. *People v. Powers, et al.*, 122 Ill. App. 3d 629, 461 N.E.2d 549 (3rd Dist. 1984). The Illinois Supreme Court denied leave to appeal June 5, 1984.

II.

ARGUMENT

THE VALIDITY OF ILLINOIS SUPREME COURT RULE 413 WAS NOT RAISED OR DECIDED BY THE STATE APPELLATE COURT, IS IRRELEVANT TO RESOLUTION OF THE CASE, AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE JURISDICTIONAL STATEMENT.

Appellant's invocation of this Court's jurisdiction pursuant to 28 U.S.C. §1257(2) is premised upon the contention that Illinois Supreme Court Rule 413 (Ill. Rev. Stat. 1979, ch. 110A, §413) is unconstitutional. Appellant, however, did not attack the constitutionality of the rule in the state appellate courts and the issue was not addressed by those courts. Moreover, the validity of Rule 413 is irrelevant to the propriety of his contempt citation. This Court's appellate jurisdiction accordingly does not lie. Nor has appellant presented a substantial federal question for review warranting exercise of this Court's discretion to grant a petition for writ of certiorari pursuant to 28 U.S.C. §§1257(3) and 2103.

The law is clear in Illinois that in the absence of an enabling statute or Supreme Court Rule, the defendant in a criminal case may not prosecute an interlocutory appeal. *People v. Miller*, 35 Ill.2d 62, 219 N.E.2d 475 (1966); *People v. Zach*, 77 Ill. App. 3d 17, 395 N.E.2d 753 (3rd Dist. 1979). In the present case, appellant sought to appeal the denial of his request that the State be prohibited from transcribing and reviewing grand jury testimony allegedly obtained in violation of his client's rights. As the appellant held, this order was not appealable under Illinois law and, accordingly, the filing of appellant's Notice of Appeal did not deprive the trial court of jurisdiction over the cause. *See Miller, supra.*

It is also clear in Illinois that, as a general rule, if a trial court has jurisdiction over the parties, its orders must be obeyed until set aside by a reviewing court and the validity of a lawyer's position asserted on behalf of his client does not excuse otherwise contemptuous conduct. *People v. Graves*, 74 Ill.2d 279, 383 N.E.2d 1311 (1979); *People v. Haas*, 100 Ill. App. 3d 1143, 427 N.E.2d 853 (1st Dist. 1981). In *Maness v. Meyers*, 419 U.S. 449 (1975), this Court similarly recognized that one who refuses to obey even improper orders will typically risk criminal contempt inasmuch as "[r]emedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable and orderly processes are imperative to the operation of the adversary system of justice." *Id.* at 460. There, however, compliance with a court order of production in violation of the fifth amendment would in fact have led to irreparable injury; unlike in *United States v. Blue*, 384 U.S. 251 (1966), the "cat" was not yet "out of the bag". *Id.* at 463.

The order in the present case was not an order to produce but to proceed with the trial of a pending criminal prosecution. Moreover, appellant was found in contempt of court only after he had complied with discovery and the grand jury proceedings had been transcribed and reviewed. Because proceeding to trial would not irrevocably exacerbate any violation of his client's rights, "[s]ubsequent appellate vindication . . . [would] have its ordinary consequence of totally repairing the error." *Maness, supra* at 460. *See also United States v. MacDonald*, 435 U.S. 850 (1978).

Appellant also posits that his citation for contempt violates the first and sixth amendments. These contentions, however, were not presented to the appellate court and have been waived. In any event, they are without merit. Appellant's conduct in refusing to proceed to trial after

numerous unequivocal orders to do so is manifestly not protected speech. And even assuming imposition of a $1,009.00 fine without incarceration triggers the right to trial by jury [*but see Munis v. Hoffman*, 422 U.S. 454 (1975)], it has been clear since this Court's decision in *Taylor v. Hayes*, 418 U.S. 488, 496 (1974), that the State may reduce a contemnor's sentence so as to obviate the need for a jury trial. *See also Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Gerard v. Goins*, 575 F.2d 160 (8th Cir. 1978); *Douglas v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976).

III.

CONCLUSION

For the foregoing reasons, appellee respectfully requests that this Court dismiss the appeal filed herein and deny the alternative relief requested by appellant pursuant to 28 U.S.C. §2103.

Respectfully submitted,

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Office-Supreme Court, U.S.
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NOV 3 1984
ALEXANDER L. STEVAS,
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ON APPEAL FROM THE
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BRIEF OPPOSING MOTION TO DISMISS AND TO DENY ALTERNATIVE RELIEF

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Appellee, PEOPLE OF THE STATE OF ILLINOIS, assert that issues concerning the constitutionality of Illinois Supreme Court Rule 413 have been waived by

the appellant. In fact, the constitutionality of that rule was addressed by appellant in argument before the trial court. The effect of Rule 413 disclosure by the defendant in the case at bar led to the further violation of defendant Paul Powers' Fifth and Fourteenth Amendment rights by the State's Attorney's abuse of the grand jury process.

The constitutionality of Rule 413 was questioned by appellant at an early stage of these proceedings, before the trial judge found him in contempt. Appellant's actions which led to the trial judge citing him for contempt of court can only be understood by reference to appellant's position which he consistently maintained in the proceedings below, that Rule 413 is an unconstitutional usurpation of defendant's Fifth and Fourteenth Amendment

rights.

It appears that appellee chooses to rely solely on its waiver argument with respect to issues of the constitutionality of Illinois Supreme Court Rule 413, and appellee concedes, since it makes no argument in opposition, that Rule 413 is a "statute" for purposes of invoking the United States Supreme Court's jurisdiction under 28 U.S.C. 1257 (2). Appellee also makes no response to appellant's point that the judgment below is final for purposes of review by this tribunal.

Appellee would divert this court's attention to issues having no significance to the instant appeal, e.g., whether and under what circumstances Illinois procedure allows interlocutory appeals, and whether in the ordinary course, a trial court's orders must be obeyed.

Appellant submits that the question of paramount importance is whether an attorney may be held in contempt for undertaking a good faith attempt to protect and foster his defendant-client's Fifth and Fourteenth Amendment rights regardless of whether his position is ultimately held to be correct under the law.

An inseparable adjunct to that inquiry is whether citing an attorney for contempt of court because of his good faith assertion of his client's Fifth and Fourteenth Amendment rights offends against rights guaranteed the attorney by the Fifth and Fourteenth Amendments to the United States Constitution. Appellant asserts that the answer to the first of these intrinsically related questions is negative and that the answer to the second is af-

firmative.

The centerpiece of appellee's motion to dismiss is its citation of Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975). However, although certain points are cited out of context from the Maness opinion by appellee, perusal of the entire Maness opinion leaves the reader with the unshakeable conviction that that decision supports appellant's, rather than appellee's position.

As in Maness, appellant Olivero was faced with the threat of imminent and irreparable harm to his client's Fifth and Fourteenth Amendment rights. That is, had defendant and his attorney proceeded to trial below, the State's Attorney would have had the use of what amounted to a pre-trial discovery deposition taken from an important defense

witness precipitately before trial. The taking of such a pre-trial discovery deposition and its impending use at trial in violation of defendant's Fifth and Fourteenth Amendment rights threatened to afford a decided tactical advantage to the State at trial.

Despite statements to the contrary in the opinion of the Third District Appellate Court of Illinois, an order in limine would not have cured the threatened prejudice and irreparable harm to defendant's Fifth and Fourteenth Amendment rights. Defendant's counsel feared that the State's Attorney's taking a pre-trial discovery deposition from one of the defense's important witnesses could effectively deprive the defense of any meaningful use of that witness' testimony at trial. That is so because the State's Attorney had obtained a

useful tool for impeachment, i.e., the transcribed grand jury testimony of Nina Errio.

The existence and use of that transcript would be likely to shift the tactical advantage of trial to the State. The trial court had indicated that it saw nothing improper about the State's Attorney's use of the grand jury, so that no order in limine was likely to be forthcoming. Furthermore, defense counsel had no corresponding power to depose key State witnesses. Trial was imminent, and in the good faith belief that the foregoing facts constituted an appropriate instance for the Appellate Court to assume jurisdiction of the controversy, appellant chose to place himself in peril of a contempt citation rather than jeopardize his client's constitutional rights.

The Maness v. Meyers opinion cites In re Watts, 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933 (1903) at 419 U.S. 467:

> "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule." (190 U.S. 29, 23 S.Ct. 725). (Emphasis Supplied.)

Watts involved the contempt citations of lawyers who had advised their clients that state, not federal, courts had bankruptcy jurisdiction over property in the hands of a receiver. The lawyers' advice was found to be incorrect, but there was no evidence of bad faith chargeable to the attorneys.

Most of appellee's brief in support of their motion to dismiss is taken up

with whether appellant's taking an interlocutory appeal was a correct procedural step under Illinois law. That argument misses the point, since the relevant inquiry is whether that step, even if incorrect, was taken by appellant in bad faith. There is absolutely no evidence whatsoever of bad faith on the part of appellant. Therefore, the rule of In re Watts controls and appellant cannot be guilty of contempt of court.

Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed. 897, cited by appellee, supports appellant's position rather than appellee's in another respect, namely, that appellant's conviction for contempt of court cannot stand because he was not afforded fundamental due process of law before being found guilty of contempt. Taylor v. Hayes

states at 418 U.S. 498 as follows:

> "Our decisions establish that summary punishment [for contempt] need not always be imposed during trial if its [sic] is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings. Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952); cf. Mayberry v. Pennsylvania, 400 U.S. 455, 463, 91 S.Ct. 499, 504, 27 L.Ed.2d 532 (1971). But Sacher noted that '[s]ummary punishment always, and rightly, is regarded with disfavor . . .' 343 U.S. at 8, 72 S.Ct. at 454. '[W]e have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" Groppi v. Leslie, 404 U.S. 496, 502, 92 S.Ct. 582, 586, 30 L.Ed.2d 632 (1972), quoting In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948)."

At pages 498 and 499, the Taylor v. Hayes opinion continues as follows:

"Groppi counsels that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." (Emphasis Supplied.)

And again at page 500:

"These procedures are essential in view of the heightened potential for abuse posed by the contempt power. Bloom v. Illinois, 391 U.S., at 202, 88 S.Ct., at 1482; Sacher v. United States, 343 U.S., at 12, 72 S.Ct., at 456. The provision of fundamental due process protections for contemnors accords with our historic notions of elementary fairness. While we have no desire 'to imprison the discretion of judges within rigid mechanical rules,' Offutt v. United States, 348 U.S., at 15, 75 S.Ct., at 14, we remain unpersuaded that 'the additional time and expense possible involved . . . will seriously handicap the effective functioning of the courts.' Bloom v. Illinois, supra, 391 U.S. at 208-209, 88 S.Ct. at 1486. Due process cannot be measured in minutes and hours or dollars and cents." (Emphasis Supplied.)

Having observed that the minimal requirements of due process were not provided to petitioner in Taylor v. Hayes, this court set aside that contempt judgment.

It is obvious that in the case at bar the trial judge afforded absolutely no opportunity for appellant to answer in his own behalf or be notified of the charges against him before sentencing him for contempt of court. All of the proceedings in the case at bar were in chambers and not during trial. This discussion took place during the pretrial proceedings. The trial judge entered his order finding the appellant in contempt of court and set the fine at $1,009.00. The trial judge never reduced the fine to $500.00. It is the position of the appellant tht the Appellate Court cannot reduce the fine to

$500.00 after the fact. The trial court's rush to judgment in condemning appellant for contempt of court and imposing a fine well above the limits of a penalty imposed for petty offense under Illinois law, (see Illinois Revised Statutes, Chapter 38, Sections 1005-9-1, a 4 and 1005-1-17) violated appellant's right to procedural due process of law guaranteed him by the Fourteenth Amendment.

Illinois authority holds that an attorney's efforts to zealously represent his client's interest should not ordinarily give rise to a citation for contempt. People v. Knuppel, 65 Ill. App.3d 1022, 22 Ill.Dec. 768, 383 N.E.2d 244.

Appellant filed an interlocutory appeal relying on Illinois authority and persuasive authority from the Seventh

Circuit Court of Appeals. City of Chicago v. Meyers, 37 Ill.2d 470, 227 N.E.2d 760, states at page 761 of the Northeastern Reporter Second Series as follows:

> "The jurisdiction of the appellate court attaches upon the proper filing of a notice of appeal. Thereafter, excepting certain instances not here concerned, the cause is beyond the jurisdiction of the trial court." (Emphasis Supplied.)

Appellant took the position that after the filing of a notice of appeal proper in form, the trial court lost jurisdiction, and in any event could make no order in derogation of the jurisdiction of the Third District Appellate Court of Illinois. It was appellant's position that until the Third District Appellate Court dismissed the notice of appeal, the matter appealed was properly before the Third Dis-

trict Appellate Court of Illinois and not the trial court. The trial court had no jurisdiction to enter orders which could moot the question appealed. That is, it is not for any trial court to decide whether a notice of appeal properly vests jurisdiction in the Appellate Court. It was equally improper for the trial court to order appellant to trial when an interlocutory appeal was pending before the Third District Appellate Court of Illinois.

By proceeding to trial, appellant would waive the issues raised in his appeal and the appeal would become moot. It must be remembered that the State of Illinois in Appellate Court No. 3-83-0538 (the appeal filed on August 26, 1983) filed an affidavit, a verified motion to dismiss, objection to the defendant's application to stay proceed-

ings, an affidavit of Court Reporter Janice M. Donnelly, and thereafter litigated at the appellate forum whether an interlocutory appeal was properly taken.

The trial court by ordering appellant to trial despite the pendency of his appeal in the Appellate Court No. 3-83-0538 usurped the jurisdiction of the Third District Appellate Court of Illinois, thereby confronting appellant with the Hobson's choice of whether to waive the issues presented for appeal or in the alternative to resist the trial court's order to proceed to trial and risk a citation for contempt. Appellant chose the latter course rather than compromise his client's rights.

By ordering appellant to trial when his appeal was pending, the trial court implicitly rejected all of the constitu-

tional arguments which had been posed in appellant's application to stay proceedings addressed to the trial court and the Third District Appellate Court of Illinois. These included the arguments that should the trial proceed, defendant would be denied a fair trial, denied equal protection of the law, deprived of liberty without due process of law and deprived as well of the fundamental fairness guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, appellee's argument that constitutional questions have been waived in the reviewing courts below is totally without merit.

In his application to stay proceedings, in addition to citing City of Chicago v. Meyers, appellant cited Mara v. United States, 454 F.2d 588 (7th Cir.,

1971), reversed on other grounds United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99, holding that it is an abuse of the grand jury process to use it as a means of discovering information which can be discovered through the normal investigative process. In the Third District Appellate Court and in his petition for appeal as a matter of right to the Illinois Supreme Court, appellant cited In re November, 1979 Grand Jury, 616 F.2d 1021 (7th Cir., 1980). In re November, 1979 Grand Jury, cited Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, _____, which provided for an appeal by persons subpoenaed to testify before the grand jury about potentially privileged matters but who themselves were not persons within the privilege. In order to avoid such person being faced with

the difficult choice of testifying or risking a contempt citation, the United States Supreme Court allowed them to challenge the subpoenas on appeal. The Seventh Circuit Court of Appeals in In re November, 1979 Grand Jury applied the Perlman exception in order to provide flexibility on the question of interlocutory appeal.

As appellant argued below, there is Illinois precedent for interlocutory appeals by defendants in criminal cases. People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, involved the contempt citation of a defense attorney who refused to produce information pursuant to a pre-trial discovery order. The criminal trial was stayed so as to enable the defense attorney to appeal his conviction for contempt.

Illinois Supreme Court Rule 606

provides in pertinent part as follows:

> "No step in the perfection of the appeal other than the filing of the notice of appeal is jurisdictional."

For all of the foregoing reasons, appellant's position in the trial court that jurisdiction had shifted to the Third District Appellate Court upon his filing a notice of appeal and that therefore he could not properly be ordered to commence trial, finds ample support in Illinois Supreme Court Rules and Illinois case law as well as persuasive federal authority. Since appellant's arguments in the trial court were steeped in authority, sincerely held, and since in addition there was a threat of irreparable harm to defendant's rights should the case proceed to trial, there is obviously such a showing of good faith on the part of appellant that

his contempt conviction cannot stand.

CONCLUSION

No constitutional issues raised in appellant's jurisdictional statement were waived in the courts below. According to the very authorities cited by appellees, appellant's citation for contempt cannot stand since he was denied fundamental due process of law. Appellant's behavior in the trial court represents good faith zealous advocacy which should not be penalized as contempt. Therefore, appellant's contempt conviction should be reversed.

Respectfully submitted,

LOUIS E. OLIVERO

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Maness v. Meyers, 419 U.S. 449, 955 S.Ct. 584, 42 L.Ed.2d 574 (1975), page 5.

Mara v. United States, 454 F.2d 588 (7th Circ., 1971) reversed on other grounds United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99, pages 17, 18.

Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, ____, pages 18, 19.

In re November, 1979 Grand Jury, 616 F.2d 1021 (7th Cir., 1980), pages 18, 19.

Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897, pages 9 - 11.

In re Watts, 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933 (1903), pages 8, 9.

People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, page 19.

Fifth Amendment to the Constitution of the United States, pages 2, 4, 5, 6, 17.

App. 2

Fourteenth Amendment to the Constitution of the United States, pages 2, 4, 5, 6, 13, 17.

28 U.S.C. 1257 (2), page 3.

Illinois Supreme Court Rule 413, pages 1, 2, 3.

Illinois Supreme Court Rule 606, pages 19, 20.

Illinois Revised Statutes, Chapter 38, Sections 1005-9-1(a)(4) and 1005-1-17, page 13.